STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2003
v	No. 234426 Isabella Circuit Court
ROBERT JAMES BOTOS, Defendant-Appellant.	LC No. 00-009640-FH

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant Robert James Botos appeals of right from his jury conviction of two counts of fourth-degree criminal sexual conduct (CSC), MCL 750.520e(1)(a) (child between thirteen and sixteen years of age and defendant at least five years older), and one count of furnishing tobacco to a minor, MCL 722.641. Defendant was sentenced to five years' probation with 270 days' imprisonment for the CSC IV convictions with credit for one day already served. He was also ordered to pay $250 in fines and $500 in attorney fees for each CSC conviction. With regard to the furnishing tobacco to a minor conviction, defendant was ordered to pay a $50 fine and $100 in costs. We affirm.

Defendant claims that his trial counsel advised him not to testify because if he did the prosecutor would impeach him with his prior misdemeanor conviction for stalking. Defendant argues that this advice was legally incorrect and that it constituted ineffective assistance of counsel. Defendant claims that by not testifying, he lost the opportunity to inform the jury that the allegations against him were based on the complainant's guardian's desire to terminate defendant's custody of his daughter and on the complainant's desire to deflect suspicion from herself for the theft of defendant's ring. Defendant contends that he "is entitled to a new trial because if he had testified the result may have been different."

This Court reviews de novo a claim of ineffective assistance to determine if the defendant has established that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that a reasonable probability exists that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 302-303, 314; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668, 687, 693-694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance is presumed and, because the reviewing court does not second-guess counsel on matters relating to trial strategy, the defendant bears a heavy burden of overcoming the strong presumption that the challenged

decision was sound trial strategy. *Pickens, supra* at 330; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

It is insufficient for defendant to show merely that "the result may have been different." To succeed in establishing ineffective assistance, defendant must demonstrate "the existence of *a reasonable probability* that, but for counsel's error, the result of the proceeding *would have been different*." *Carbin, supra* at 600, emphasis supplied, citing *Strickland, supra* at 694. Therefore, if defendant acknowledges that, at best, his claim of ineffective assistance *might* have resulted in a different outcome, he is not entitled to relief.

Because defendant's claims were not evaluated in an evidentiary hearing, we are unable to make a definitive conclusion regarding the first prong of the ineffective assistance of counsel analysis. However, it is not necessary for this Court to make any determination regarding the performance prong because in order for defendant to prevail on a claim of ineffective assistance, it is necessary that defendant show that he was prejudiced by his counsel's objectively unreasonable errors. *Pickens, supra* at 314; *Strickland, supra* at 693. A reviewing court is not required to consider the two prongs of the test in order, but may first determine whether a defendant was prejudiced before turning to examine the performance prong. *Strickland, supra* at 697. To establish prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id.* at 694. In the context of a defendant's challenge to his conviction, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

A State Police trooper testified that when he interviewed defendant concerning the allegations, defendant admitted giving cigarettes to the complainant, but denied any sexual contact with her. Thus, in addition to defendant's general denial—offered in the form of his plea of not guilty—the jury heard that defendant directly denied the allegation of sexual contact. Defendant argues that it would have been more meaningful for him to deny the allegations in the course of testifying before the jury. However, it is mere speculation that an "in-person" denial would have swayed the jury to acquit defendant; thus, defendant has not demonstrated a reasonable probability that his testimony would have caused a different result. *Pickens, supra* at 303.

Defendant also claims that he could have suggested a motive for the complainant's guardian to offer damaging testimony: that she wanted to use the allegations of sexual misconduct to terminate defendant's parental rights with respect to his daughter (her granddaughter). However, the guardian admitted that she had discussed with a state social worker the possibility of her daughter regaining custody of the child, and she further admitted that her relationship with defendant had been all right before the criminal charges were filed and that she was able to see her granddaughter all the time, but that now her relationship with him had gone "down hill" and that her "visitation rights" with her granddaughter had ended. Counsel was then free to argue to the jury—as he did—that based on this testimony, the complainant's guardian had pressed the criminal charges in order to get defendant in trouble and assist her daughter in regaining custody of the granddaughter.

Defendant has not offered any evidence that he possesses that contravenes the guardian's direct testimony, and he would not have been permitted to give speculative testimony about her motives absent any proof to support such speculation. Therefore, the absence of defendant's testimony did not cause him prejudice because testimony from which defendant could argue that the guardian was motivated by the custody issue *was* presented, and defendant could not have offered direct testimony concerning the guardian's alleged motive anyway. Again, defendant has failed to demonstrate a reasonable probability that, absent counsel's mistake, a different result would have occurred.

Finally, regarding the complainant's possession of the engagement ring, defendant argues that he could have testified that the complainant stole the ring from him and that, without his testimony, there was no affirmative assertion that she had committed theft. It is not clear that defendant could have testified that the complainant stole his ring. He could have testified that he did not give the ring to her, but he does not suggest that he actually saw her take the ring. Thus, even if defendant had testified that he did not give the ring to the complainant, the probative strength of that denial would have been minimal.

Moreover, whether defendant gave the ring to the complainant or she stole it from him, her possession of the ring did not prove that he sexually molested her. The probative value of the ring was simply that it supported the prosecutor's theory of defendant's motive: defendant was enamored of the complainant and tried to seduce her by giving her money, cigarettes, calling cards (all of which were acknowledged), *and* the ring. Finally, defendant's counsel argued to the jury that the complainant's behavior and testimony suggested strongly that she was caught with the ring and made up her accusations and lied regarding defendant's behavior to get herself "out of a jam." Thus, defendant's suggestion that the ring was stolen was presented to the jury in his counsel's argument.

For these reasons, this Court concludes that defendant has not demonstrated a reasonable *probability* that defendant's testimony would have caused the jury to have a reasonable doubt regarding his guilt. *Pickens, supra*. Defendant has therefore failed to demonstrate that he was deprived of his constitutional right to effective assistance of counsel.

Defendant also contends that a non-contact provision in his order of probation deprived him of a fundamental constitutional right—his parental rights regarding his nine-year-old daughter—without notice or an opportunity to be heard and therefore violated his constitutional right to due process of law. Defendant further argues that this provision was neither lawful nor rationally related to his rehabilitation and therefore it was an abuse of the sentencing court's discretion to impose it.

While this case was pending on appeal, defendant's appellate counsel moved in the trial court for a modification of the non-contact provision in defendant's order of probation to permit defendant to have contact with his own nine-year-old daughter. The court granted defendant's motion and modified the non-contact provision in the order of probation to permit defendant to have contact with his daughter, his minor niece, and other children under sixteen years of age in the discretion of his probation agent and consistent with the orders of the family court.

The modification of the order of probation by the addition of these conditions renders defendant's appellate claims moot. "An issue becomes moot when an event occurs which makes

it impossible for this Court to fashion a remedy." *People v Greenberg*, 176 Mich App 296, 302; 439 NW2d 336 (1989), citing *Crawford Co v Secretary of State*, 160 Mich App 88, 93; 408 NW2d 112 (1987). The entry of a modified order of probation—containing conditions that defendant himself apparently urged on the court—makes it impossible for this Court to fashion a remedy. Defendant's disagreement with the original conditions has been alleviated by the modified order; defendant does not now ask for some other relief that the trial court denied him. Instead, defendant seeks prospective, broad-ranging declaratory relief in the form of an opinion holding generally that no court can impose similar conditions in other cases. Defendant suggests such relief is appropriate because the issue is likely to recur and yet evade appellate review. *Hinton v Parole Bd*, 148 Mich App 235, 238-239; 383 NW2d 626 (1986). This Court does not agree.

If, in some future case, another trial court imposes a similar non-contact provision and does not modify or set it aside, this Court will be able to review the issue should it be raised in a proper appeal. Defendant fails to indicate precisely why this case—which the issue is no longer ripe—presents the only opportunity this Court will ever have to rule on this claim. Therefore, because the issue is moot and defendant presents no compelling reason for considering the issue now, we decline to consider it.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald